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9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE DISTRICT OF OREGON

11 SARAH STEWART (f.k.a. Sarah )  
Hills), )

12 Plaintiff, )

No. CV-04-428-HU

13 v. )

14 SEARS, ROEBUCK AND CO., a )  
15 foreign corporation, )

FINDINGS & RECOMMENDATION/  
ORDER

16 Defendant. )  
17 \_\_\_\_\_)

18 Ralph F. Rayburn  
RAYBURN LAW OFFICE  
17685 S.W. 65th Ave., Suite 300  
19 Lake Oswego, Oregon 97035

20 Attorney for Plaintiff

21 Barry Alan Johnsrud  
JACKSON LEWIS LLP  
22 One Union Square  
600 University Street, Suite 2900  
23 Seattle, Washington 98101

24 Attorney for Defendant

25 HUBEL, Magistrate Judge:

26 Plaintiff Sarah Stewart, formerly known as Sarah Hills, brings  
27 this employment action against defendant Sears, Roebuck & Company,  
28 her former employer. Plaintiff contends that defendant violated

1 her rights under the federal Family Medical Leave Act (FMLA) and  
2 Oregon's Family Leave Act (OFLA). She also brings a state common-  
3 law wrongful discharge claim and a claim under Oregon Revised  
4 Statute § (O.R.S.) 652.150 for the alleged failure to timely pay  
5 her wages at the time of her discharge.

6 Defendant moves for summary judgment on both Leave Act claims  
7 and the wrongful discharge claim. Plaintiff moves to strike  
8 certain exhibits defendant relies cites in support of its motion.  
9 I recommend that defendant's motion be denied in part and deferred  
10 on one issue under after oral argument as described below. I deny  
11 plaintiff's motion as moot.

#### 12 BACKGROUND

13 From 1996 until October 9, 2003, plaintiff worked for  
14 defendant as an Appliance Select Consultant, as a trainer in the  
15 Human Resources Department, and in a Home Life store. The events  
16 in this action concern her position as an Appliance Select  
17 Consultant.

18 Defendant's "Contract Sales" division sells appliances for new  
19 homes and multi-family developments. The supervisor of the Sales  
20 Department of the Western Region of Contract Sales is David  
21 Bradlaw. One of the districts within the Western Region of  
22 Contract Sales under Bradlaw's supervision is the Pacific Northwest  
23 Division, supervised by District Sales Manager (DSM) SueLynn Cole  
24 since October 2002. The DSM supervises both Account Managers and  
25 Appliance Select Consultants. Account Managers meet with builders  
26 and developers on established accounts and meet with prospective  
27 builders to establish new accounts. Appliance Select Consultants  
28 are trained to assist homebuyers and builders in selecting

1 appliances for their new homes.

2 Typically, the Account Manager and the builder establish a  
3 standard package of appliances for the home. Sometimes, builders  
4 direct their homebuyers to go to an Appliance Select Center where  
5 they may upgrade their appliances for an additional cost. At the  
6 Appliance Select Center, an Appliance Select Consultant will meet  
7 with the homebuyer. Generally, the Appliance Select Consultant  
8 must have current knowledge and information about products and  
9 pricing, together with the specifications made by the builder as to  
10 dimensions, and whether the builder will add a markup to the price  
11 charged to the builder by defendant, or whether the homebuyer may  
12 deal directly with defendant on additional costs.

13 The Appliance Select Centers are also supported by an  
14 Appliance Select Support Manager who trains Appliance Select  
15 Consultants on new software, protocols, and equipment used in  
16 running the Appliance Select Center, and assists management in  
17 addressing issues arising within the Center. The Appliance Select  
18 Support Manager has no hiring, firing, or disciplinary authority  
19 over an Appliance Select Consultant. On or about April 1, 2003,  
20 Lori Boehm became Regional Appliance Select Support Manager for the  
21 Western Region.

22 In her role as DSM, Cole was plaintiff's immediate supervisor.  
23 Plaintiff states that in early 2003, Cole gave her a performance  
24 appraisal in which she noted that plaintiff met or exceeded all  
25 aspects of her job performance. Ptlf's Exh. 100 (Pltf Declr.) at  
26 ¶ 9. According to Cole, plaintiff's revenue growth at this  
27 appraisal did not meet expectations. Deft's Exh. 12A (Cole Depo.)  
28 at p. 66; see also Deft's Exhs. 52, 53, 54 (various versions of

1 January 2003 performance review showing scores from "some  
2 expectations met" to "far exceeds expectations" depending on the  
3 particular skill assessed).

4 Cole states that in June 2003, she received complaints from  
5 Portland Account Managers Randy Nehl and Troy Peterson about  
6 plaintiff's responsiveness to builder customers. Deft's Exh. 12  
7 (Cole Depo.) at p. 68. As Cole describes, Peterson and Nehl felt  
8 that plaintiff was not giving adequate service to the builders who  
9 were indicating they no longer wanted to work with the Appliance  
10 Select Center. Id. At the same time, however, plaintiff told Cole  
11 that the reason the builders were not using the Appliance Select  
12 Center was a lack of support and understanding by the Account  
13 Managers. Id. at pp. 68-69. In fact, plaintiff notes that in  
14 2002, she emailed Bradlaw regarding her concerns about Account  
15 Managers not supplying appropriate builder information and  
16 customers for the Appliance Select Center to adequately reach its  
17 goals. Ptlf's Exh. 100 (Pltf Declr.) at ¶ 6.

18 On June 12, 2003, Nehl emailed Cole a list of complaints from  
19 customers regarding plaintiff's failure to return their calls.  
20 Deft's Exh. 25. Nehl explained to Cole that he needed a "select  
21 consultant" that he could always depend on and that presently, they  
22 were "limiting ourselves to [l]ow expectations, as well as poor  
23 service." Id. On June 26, 2003, Nehl emailed plaintiff a  
24 complaint he received from Concept Construction concerning customer  
25 service provided by plaintiff to Doug and Keri Lightfoot. Deft's  
26 Exh. 27. Nehl copied Cole with the email. Id. The complaint  
27 noted plaintiff's failure to return calls and the order of a  
28 replacement dishwasher which was out of stock or discontinued. Id.

1 In late July, Cole received a telephone call from Zach Elkins,  
2 National Sales Manager for Contract Sales, stating that customer  
3 service complaints from builder client Bruce McIntosh about the  
4 Tigard/Portland Appliance Select Center where plaintiff worked, had  
5 come to his attention and needed to be addressed. Deft's Exh. 16  
6 (Cole Declr.) at ¶ 7.

7 Cole then talked directly with McIntosh about the complaints.  
8 Id. at ¶ 8; see also Deft's Exh. 34 (Cole email to Bradlaw and  
9 Elkins regarding conversation with McIntosh). McIntosh complained  
10 of telephone calls not being returned. Id. He complained of  
11 problems with plaintiff's availability and responsiveness and noted  
12 complaints from his homebuyers of cancelled appointments. Id.  
13 Cole emailed Bradlaw and Elkins regarding her conversation with  
14 McIntosh and told them that she would speak with plaintiff the day  
15 she wrote the email, July 30, 2003, and that she believed  
16 plaintiff's performance would improve immediately, and if not, the  
17 appropriate steps would be taken. Deft's Exh. 34.

18 According to Cole, on July 30, 2003, Cole visited plaintiff  
19 and discussed complaints of poor customer service and failure to  
20 return calls. Deft's Exh. 16 (Cole Declr.) at ¶ 9. She told  
21 plaintiff that complaints had gone to Elkins at company  
22 headquarters and there must be no further customer service  
23 complaints. Id.

24 Plaintiff neither confirms nor denies that this meeting took  
25 place. In her response to defendant's factual assertion regarding  
26 this meeting, plaintiff states that she does not dispute that Cole  
27 visited with her in late August, but she makes no mention of the  
28 July 30, 2003 meeting. Pltf's Resp. to Deft's CSF at ¶ 7. In her

1 declaration, she states that from October 2002 when Cole became her  
2 supervisor until August 2003, plaintiff received no written  
3 discipline or corrective action plan from Cole. Ptlf's Exh. 100  
4 (Pltf Declr.) at ¶ 10. Because Cole gave no written discipline to  
5 plaintiff at the July 30, 2003 meeting, plaintiff's reference to  
6 having received no written discipline does not contradict Cole's  
7 assertion that she met with plaintiff on July 30, 2003, regarding  
8 the customer complaints she was aware of to date, and that she  
9 orally warned plaintiff that additional customer service complaints  
10 would not be tolerated.

11 Either during the July 30, 2003 conversation or shortly  
12 thereafter, Cole remembers plaintiff telling her that she needed to  
13 spend time away from work in August 2003 to care for a sick family  
14 member. Deft's Exh. 12 (Cole Depo.) at p. 77. Cole agreed that  
15 plaintiff could miss work and cover the telephones from the  
16 hospital. Id. at pp. 77, 136-37. Cole asserts that this was a  
17 one-time authorization. Plaintiff contends that the approval was  
18 not limited to just one day. Pltf's Exh. 100 (Pltf Declr.) at ¶  
19 15.

20 In August 2003, Nehl and Portland Account Manager Debra Cler  
21 told Cole about additional performance concerns regarding  
22 plaintiff. Deft's Exh. 16 (Cole Declr.) at ¶ 10. The concerns  
23 included complaints about plaintiff's responsiveness. Id.; Deft's  
24 Exhs. 35, 36 (Aug. 1, 2003 emails from Nehl to Cole relaying  
25 complaints from customers regarding plaintiff's failure to return  
26 calls and failure to give pricing); Deft's Exh. 39 (Aug. 21, 2003  
27 email from Cler to Cole noting customer compliment regarding  
28 plaintiff, but alluding to previous undisclosed problems this

1 customer had with plaintiff).

2 Other concerns included plaintiff's casual dress, her handling  
3 of a credit on a particular account, and her selling an item at a  
4 price that seemed too low. Deft's Exhs. 37, 38 (Aug. 13, 2003 and  
5 Aug. 15, 2003 emails from Portland Account Manager Kellie Stevens  
6 to Nehl regarding plaintiff's dress; Aug. 13, 2003 and Aug. 15,  
7 2003 forwards of Stevens's emails by Nehl to Cole with additional  
8 comment by Nehl on Aug. 15, 2003, regarding plaintiff leaving work  
9 early); Deft's Exh. 40 (several emails beginning July 12, 2003, and  
10 ending Aug. 21, 2003, regarding a credit to an account); Deft's  
11 Exhs. 41, 42 (several emails from Nehl beginning July 16, 2003, and  
12 ending Aug. 21, 2003, regarding pricing on a particular item).

13 On or about August 27, 2003, Cole discussed these issues with  
14 Bradlaw. Deft's Exh. 16 (Cole Declr.) at ¶ 11. Bradlaw instructed  
15 Cole to issue a performance warning to plaintiff for poor customer  
16 service. Id.

17 On or about August 28, 2003, Cole met with plaintiff to  
18 express concerns about plaintiff's job performance and the numerous  
19 customer complaints she had learned about in August. Id. at ¶ 12.  
20 Cole did not write plaintiff up for the customer service issues  
21 because once the write-up was on file, plaintiff would be  
22 ineligible to transfer to another department pursuant to  
23 defendant's policy. Id. at ¶ 13; see also Pltf's Exh. 105 (Cole  
24 Depo.) at pp. 80-83 (explaining that there are serious consequences  
25 for customer service complaints and Cole did not want to do  
26 anything in writing that could have a negative effect on plaintiff  
27 in the long term).

28 During the August 28, 2003 meeting, plaintiff asked Cole about

1 family leave related to her niece's terminal illness. Deft's Exh.  
2 12 (Cole Depo.) at pp. 85, 86; Deft's Exh. 16 (Cole Declr.) at ¶  
3 14. Cole and Stewart together called Arquette Bailey, defendant's  
4 human resource employee assigned to Contract Sales associates.  
5 Deft's Exh. 12 (Cole Depo.) at p. 86; Deft's Exh. 16 (Cole Declr.)  
6 at ¶ 14. Bailey told Cole and plaintiff that an illness of a niece  
7 did not qualify for FMLA leave, but that plaintiff could take an  
8 unpaid personal leave under defendant's policy. Deft's Exh. 12  
9 (Cole Depo.) at pp. 85-89; Deft's Exh. 16 (Cole Declr.) at ¶ 14;  
10 Deft's Exh. 13 (Bailey Depo.) at pp. 10-11.

11 Under a personal leave, plaintiff could take twelve weeks of  
12 unpaid leave, but in contrast to the leave under FMLA, there was no  
13 guarantee of reemployment at the expiration of the leave. Deft's  
14 Exh. 12 (Cole Depo.) at pp. 86-87; Deft's Exh. 13 (Bailey Depo.) at  
15 pp. 10-11. Cole, however, told plaintiff that she would give her  
16 a written assurance of reinstatement should she choose to take  
17 personal leave. Deft's Exh. 12 (Cole Depo.) at p. 89.

18 During this conversation, plaintiff also told Cole that her  
19 niece had asked her to take guardianship of her niece's children in  
20 the event of her death. Deft's Exh. 12 (Cole Depo.) at p. 85.  
21 Plaintiff decided to "evaluate things" and requested information  
22 about her rights. Deft's Exh. 11 (Pltf's Depo.) at p. 19.<sup>1</sup>

23 Cole's recitation of the July 30, 2003 and August 28, 2003  
24 meetings with plaintiff suggests that the first time plaintiff told  
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26 <sup>1</sup> Defendant neglected to include page 19 of plaintiff's  
27 deposition in its Exhibit 11 and I cannot locate it elsewhere in  
28 the record. However, plaintiff admits this asserted fact in her  
response to defendant's fact statement, rendering the omission of  
the underlying evidence immaterial.

1 her about a family member's medical condition was a vague reference  
2 in late July 2003 or early August 2003, and the first time  
3 plaintiff formally discussed leave was during the August 28, 2003  
4 meeting. It was during that meeting that Cole and plaintiff  
5 reached Bailey and spoke with her on the speaker phone about leave  
6 options for plaintiff regarding her niece.

7 Plaintiff's recollection is different. Plaintiff states that  
8 she learned that her niece had cancer on August 3, 2003. Pltf's  
9 Exh. 100 (Pltf Declr.) at ¶ 15. She contacted Cole the next day to  
10 talk with her about the situation and several days later, she told  
11 Cole that her niece's condition required plaintiff to take some  
12 time from work. Id. On August 15, 2003, she told Cole that her  
13 niece requested that plaintiff be a foster parent to her children.  
14 Id. She states that Cole indicated her approval of plaintiff's  
15 absence from the Appliance Select Center as long as she was  
16 retrieving her messages from work while at the hospital. Id.  
17 According to plaintiff, she had several discussions with Cole from  
18 August 15, 2003, through August 18, 2003, regarding her niece's  
19 status and her need to take leave.

20 Plaintiff appears to agree that she and Cole spoke with Bailey  
21 during the August 28, 2003 meeting. Pltf's Exh. 100 (Pltf Declr.)  
22 at ¶ 11. And, a careful reading of plaintiff's declaration  
23 indicates that although Bailey was initially unsure of whether  
24 there would be FMLA leave for the illness of a niece, she  
25 eventually told plaintiff during that conversation that she did not  
26 believe that FMLA leave was available. Id. at ¶¶ 11, 12. However,  
27 plaintiff also states that she inquired about FMLA leave to address  
28 the issues surrounding the care of her niece's children and that

1 Bailey never addressed the issue of guardianship or adoption as a  
2 basis for leave. Id. at ¶¶ 11, 12.

3 Plaintiff states that she spoke with Bailey three times  
4 regarding the issue of FMLA leave. Id. at ¶ 13. She gives no  
5 dates of these conversations and no indication of whether they were  
6 before or after the August 28, 2003 meeting between Cole and  
7 plaintiff. Presumably, they followed that meeting because her  
8 factual recitation in her declaration indicates that she first  
9 spoke with Bailey during the August 28, 2003 meeting.

10 In any event, she states that in each conversation, she asked  
11 Bailey to provide her with written information so that she could  
12 make an intelligent choice regarding her leave rights under  
13 defendant's policy and the law. Id. She states that she left  
14 messages for Elkins at least five times requesting leave  
15 information for contract sales department employees. Id. She does  
16 not state when she left those messages. Neither Bailey nor Cole  
17 ever provided her with the requested written information. Id.

18 On September 2, 2003, plaintiff told Cole that her mother had  
19 become very ill. Deft's Exh. 12 (Cole Depo.) at pp. 96, 97. Cole  
20 told plaintiff that she was sure that plaintiff's mother's illness  
21 qualified her for job-protected FMLA leave. Id. at p. 98. Cole  
22 told plaintiff that Cole would immediately contact Bailey and have  
23 Bailey contact plaintiff. Id.

24 Several days later, Bailey confirmed with plaintiff that she  
25 could take FMLA leave for her mother's illness. Deft's Exh. 13  
26 (Bailey Depo.) at pp. 28, 29. Bailey explained that unless  
27 plaintiff had unused earned vacation, flexible holidays, or  
28 personal days, FMLA leave was unpaid. Id. at p. 29.

1 Both Cole and Bailey recall that plaintiff indicated that she  
2 could not take unpaid leave. Id. at p. 30; Deft's Exh. 12 (Cole  
3 Depo.) at p. 88. Plaintiff denies that she ever indicated that she  
4 would not take unpaid leave. Pltf's Exh. 100 (Pltf Declr.) at ¶  
5 18.

6 Plaintiff states that because she never received the requested  
7 written information on leave from Cole, Bailey, or Elkins, she  
8 contacted defendant's human resources hotline called the "Sears 88  
9 line," to inquire if FMLA leave was available to her because of her  
10 niece's illness, the guardianship issue of her niece's children,  
11 and her mother's illness. Id. at ¶ 14. In her declaration, she  
12 states that the individual she spoke with thought she may be  
13 eligible for paid medical leave for herself given the significant  
14 psychological issues the family illnesses presented for plaintiff,  
15 however he was unsure if this type of leave was available to  
16 contract sales employees. Id. Additionally, while she states that  
17 she had multiple conversations with the Sears 88 line in August and  
18 September 2003, she could not have discussed her mother's situation  
19 with anyone before September 2, 2003, because that is when she  
20 first learned of her mother's terminal cancer. Pltf's Exh. 100  
21 (Pltf Declr.) at ¶ 16.

22 Plaintiff states that she received conflicting information  
23 from the Sears 88 line. Id. at ¶ 14. Because she does not detail  
24 what conflicting information she received, I assume she means the  
25 information described in her declaration regarding the possibility  
26 of paid disability leave for herself as opposed to unpaid FMLA or  
27 personal leave for the care of others.

28 According to plaintiff, she told Cole that she needed to take

1 leave as a result of her niece's illness and the guardianship of  
2 her children. Id. at ¶ 18. Plaintiff does not expressly state  
3 when she first made this request. Id. She states that when she  
4 learned that her mother was terminally ill, she advised Cole that  
5 there was no question that she would need to take leave and that it  
6 was important to receive leave information in writing. Id. Cole  
7 was aware that plaintiff received conflicting information about  
8 paid and unpaid leave. Id. However, plaintiff states that whether  
9 it was paid or unpaid was irrelevant given the state of her  
10 mother's health and terminal diagnosis. Id.

11 On September 8, 2003, plaintiff received a call back from an  
12 individual with the Sears 88 line who was trying to reconcile some  
13 of the different information she had received regarding family  
14 leave. Id. at ¶ 19. Plaintiff states that as of September 9,  
15 2003, Cole knew that she needed family leave and that she had, on  
16 two occasions, requested written information on her right to leave.  
17 Id.

18 On September 10, 2003, Cole issued a Final Warning to  
19 plaintiff for her previous violations of defendant's customer  
20 service policy. Deft's Exh. 12 (Cole Depo.) at p. 131; Deft's Exh.  
21 4. The document noted receipt of various customer service  
22 complaints and a list of expectations for improvement. Deft's Exh.  
23 4. The document also warned plaintiff that any additional customer  
24 service complaints would result in further disciplinary action up  
25 to and including termination. Id. In the section provided for the  
26 employee's comments, plaintiff requested that defendant contact  
27 listed customers who were satisfied with plaintiff's performance.  
28 Id. Cole reached one of the three customers plaintiff named, but

1 was unable to talk with him because he rushed her off the phone due  
2 to being on a long-distance call. Pltf's Exh. 105 (Cole Depo.) at  
3 p. 142. She did not follow-up with this customer. Id. She was  
4 unsuccessful in reaching another of the customers and the third was  
5 irrelevant in her opinion because the customer was actually a  
6 delivery contractor. Id.

7 Before meeting with plaintiff to give her the Final Warning on  
8 September 10, 2003, Cole talked with Bailey about documenting  
9 plaintiff's performance issues. Deft's Exh. 12 (Cole Depo.) at p.  
10 147. During that conversation, Cole talked with Bailey about  
11 plaintiff's need for paid leave. Id. Cole asked Bailey if there  
12 was anything Cole could do to get plaintiff paid time off. Id.  
13 Bailey told Cole that the only way to provide paid time off would  
14 be a one-week paid suspension. Id. Bailey told Cole that one week  
15 was the most that could be provided without "raising any red  
16 flags[.]" Id. As a result, from Thursday September 11, 2003, to  
17 Wednesday, September 17, 2003, plaintiff was suspended with pay.  
18 Deft's Exh. 4.

19 During the time that plaintiff was on suspension, Cole and  
20 Boehm worked at the Appliance Select Center. Deft's Exh. 16 (Cole  
21 Declr.) at ¶ 19. They discovered Appliance Select questionnaires  
22 that had not been followed up on and observed serious  
23 organizational issues involving customer files and files for  
24 follow-up issues. Id. Cole believed these organizational issues  
25 negatively affected plaintiff's ability to respond to customers and  
26 to properly follow-up on orders. Id.

27 Cole was in Tigard on September 18, 2003, to meet with  
28 plaintiff upon her return to work. Id. at ¶ 21. Plaintiff did not

1 return to work that day because of car trouble and Cole left town  
2 for other business. Id. When plaintiff returned to work on  
3 September 19, 2003, she was presented with a "Performance  
4 Discussion/Memo" addressing the organizational issues discovered by  
5 Boehm and Cole. Id.; Deft's Exh. 5. The document required  
6 improvement of the organization of the Appliance Select Center by  
7 September 29, 2003. Id.; Deft's Exh. 5. At plaintiff's request,  
8 this time period was extended to October 1, 2003. Deft's Exh. 12  
9 (Cole Depo.) at p. 156.

10 During this time, Cole understood that plaintiff had a legal  
11 right to take a leave of absence to care for her sick mother.  
12 Deft's Exh. 16 (Cole Declr.) at ¶ 16. Because it was not possible  
13 for Cole and Boehm to cover the work of the Appliance Select Center  
14 indefinitely or on an extended basis, Cole sought approval to hire  
15 a second Appliance Select Consultant for the Tigard/Portland  
16 Appliance Select Center. Deft's Exh. 16 (Cole Declr.) at ¶ 20.

17 Michelle Connor was hired to work at the Appliance Select  
18 Center. In response to a general application she made with  
19 defendant for any position, Helena LuLay, the retail store manager  
20 at Washington Square, called her in early September 2003 about a  
21 position as an Appliance Select Consultant. Pltf's Exh. 106  
22 (Connor Depo.) at pp. 10-11, 25-26, 28. Connor's impression from  
23 speaking with LuLay was that the current Appliance Select  
24 Consultant (plaintiff), was going to be let go and that they she  
25 would be interviewed for that position. Id. at pp. 25-26. Cole,  
26 however, stated that she did not hire Connor to permanently replace  
27 plaintiff, but only as a temporary employee while plaintiff took  
28 leave. Deft's Exh. 12A (Cole Depo.) at pp. 121-22.

1 Cole returned to Portland on October 1, 2003, and found no  
2 significant progress toward improving the situation in the  
3 Tigard/Portland Appliance Select Center. Deft's Exh. 12 (Cole  
4 Depo.) at p. 165. She issued a corrective plan to plaintiff. Id.;  
5 Deft's Exh. 7. She gave plaintiff until October 8, 2003, to get  
6 the Appliance Select Center organized to her specifications.  
7 Deft's Exh. 7; Deft's Exh. 16 (Cole Declr.) at ¶ 23.

8 In the evening of October 1, 2003, Cler forwarded Cole an  
9 email regarding a customer service issue that Pyramid Homes had  
10 with plaintiff. Deft's Exh. 45. On October 3, 2003, Cler wrote  
11 Cole an email detailing the Pyramid Homes issue and alerting Cole  
12 to another customer service issue involving plaintiff and Phoenix  
13 Group Construction. Deft's Exh. 46. At that point, Cole emailed  
14 Bradlaw, requesting approval to terminate plaintiff. Deft's Exh.  
15 16 (Cole Declr.) at ¶ 24. Bradlaw declined to give the approval,  
16 citing the extended performance improvement period. Id.

17 On October 8, 2003, Boehm assessed plaintiff's progress on the  
18 corrective plan regarding the organizational issues at the  
19 Appliance Select Center, and found that plaintiff had not completed  
20 the work required. Deft's Exh. 50. Boehm informed Cole, Bradley,  
21 and Bailey by memorandum that plaintiff did not complete the  
22 required organizational improvements and that there were continuing  
23 customer service issues with plaintiff's performance. Id.

24 Cole then prepared a final written follow-up, detailing the  
25 unmet expectations. Deft's Exh. 8. Cole terminated plaintiff the  
26 next day, October 9, 2003. Deft's Exh. 12 (Cole Depo.) at p. 167.

27 After plaintiff was terminated, she requested a copy of her  
28 evaluations. Pltf's Exh. 100 (Pltf Declr.) at ¶ 33. She was

1 advised that portions of her file, including the executed copy of  
2 her January 2003 performance evaluation, were missing. Id.; Pltf's  
3 Exh. 105 (Cole Depo.) at p. 172. Cole acknowledges that she is  
4 charged with maintaining these records. Pltf's Exh. 105 (Cole  
5 Depo.) at p. 174. It appears that the executed copy of plaintiff's  
6 January 2003 performance evaluation was eventually located as it  
7 appears as defendant's exhibit 54 in the summary judgment record.

#### 8 STANDARDS

9 Summary judgment is appropriate if there is no genuine issue  
10 of material fact and the moving party is entitled to judgment as a  
11 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
12 initial responsibility of informing the court of the basis of its  
13 motion, and identifying those portions of "'pleadings, depositions,  
14 answers to interrogatories, and admissions on file, together with  
15 the affidavits, if any,' which it believes demonstrate the absence  
16 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
17 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

18 "If the moving party meets its initial burden of showing 'the  
19 absence of a material and triable issue of fact,' 'the burden then  
20 moves to the opposing party, who must present significant probative  
21 evidence tending to support its claim or defense.'" Intel Corp. v.  
22 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
23 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
24 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
25 designate facts showing an issue for trial. Celotex, 477 U.S. at  
26 322-23.

27 The substantive law governing a claim determines whether a  
28 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors

1 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
2 to the existence of a genuine issue of fact must be resolved  
3 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
4 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
5 drawn from the facts in the light most favorable to the nonmoving  
6 party. T.W. Elec. Serv., 809 F.2d at 630-31.

7 If the factual context makes the nonmoving party's claim as to  
8 the existence of a material issue of fact implausible, that party  
9 must come forward with more persuasive evidence to support his  
10 claim than would otherwise be necessary. Id.; In re Agricultural  
11 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
12 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
13 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

#### 14 DISCUSSION

15 As noted above, defendant moves for summary judgment on the  
16 Leave Act claims and the wrongful discharge claim. I address the  
17 claims in turn.

#### 18 I. FMLA Claim

19 In her Complaint, plaintiff indicates that her leave-related  
20 claims are based on theories of interference and retaliation.  
21 Compl. at ¶¶ 12, 15. She contends that defendant interfered with  
22 her pursuit of leave and retaliated against her for expressing her  
23 need for leave. Id.

24 In Bachelder v. America West Airlines, Inc., 259 F.3d 1112  
25 (9th Cir. 2001), the Ninth Circuit discussed the difference between  
26 the FMLA's "interference" provision and its "discrimination" and  
27 "retaliation" provisions. Under 29 U.S.C. § 2615(a)(1), "the issue  
28 is one of interference with the exercise of FMLA rights, . . ., not

1 retaliation or discrimination." Id. at 1124. Under the  
2 discrimination provision seen in 29 U.S.C. § 2615(a)(2), an  
3 employer may be liable for discriminating against any individual  
4 for "opposing any practice made unlawful by this subchapter[.]" 29  
5 U.S.C. § 2615(a)(2). The retaliation provision prohibits  
6 discrimination against any individual for instituting or  
7 participating in FMLA proceedings or inquiries. 29 U.S.C. §  
8 2615(b).

9 As the Bachelder court explained, "[b]y their plain meaning,  
10 the anti-retaliation or anti-discrimination provisions do not cover  
11 visiting negative consequences on an employee simply because he has  
12 used FMLA leave. Such action, is instead, covered under §  
13 2615(a)(1), the provision governing '[i]nterference[.]'"  
14 Bachelder, 259 F.3d at 1124.

15 Although plaintiff styled her leave claims in her Complaint as  
16 interference and retaliation claims, a careful reading of her  
17 allegations in light of Bachelder shows that her FMLA claims arise  
18 only as interference claims under section 2615(a)(1) and are not  
19 discrimination claims under section 2615(a)(2) or retaliation  
20 claims under section 2615(b). This is confirmed by plaintiff's  
21 response memorandum which makes no mention of a FMLA retaliation  
22 claim and addresses her claims only as interference claims.

23 Under FMLA, qualifying employees of covered employers gain two  
24 substantive rights: (1) the right to take up to twelve weeks of  
25 leave for personal medical reasons, to care for a new son or  
26 daughter, or to care for family members with serious illnesses; and  
27 (2) the right to be restored to the employee's original position,  
28 or to a position equivalent in benefits, pay, and conditions of

1 employment, upon return from leave. 28 U.S.C. §§ 2612(a), 2614(a).

2 To protect those rights, FMLA makes it "unlawful for any  
3 employer to interfere with, restrain, or deny the exercise of or  
4 the attempt to exercise" any right under the Act. 29 U.S.C. §  
5 2615(a)(1). The Department of Labor's (DOL) implementing  
6 regulations for FMLA state that "[t]he FMLA prohibits interference  
7 with an employee's rights under the law[.]" 29 C.F.R. §  
8 825.220(a). Any violation of the FMLA itself or of the DOL  
9 regulations, constitute interference with an employee's rights  
10 under the FMLA. 29 C.F.R. § 825.220(b).

11 "Interference" means "not only refusing to authorize FMLA  
12 leave, but discouraging an employee from using such leave." Id.  
13 For example, "employers cannot use the taking of FMLA leave as a  
14 negative factor in employment actions[.]" 29 C.F.R. § 825.220(c).

15 Plaintiff bases her interference claim initially on  
16 defendant's failure to provide her with written information about  
17 her FMLA rights.<sup>2</sup> That is, she contends that defendant violated  
18 FMLA's non-interference provision simply by failing to respond to  
19

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20 <sup>2</sup> Plaintiff also contends that defendant unlawfully  
21 interfered with her FMLA rights under section 2615(a)(1) by (1)  
22 placing her under heightened scrutiny when she inquired about her  
23 rights; (2) changing her employment schedule, hiring a temporary  
24 employee, and being untruthful about the purpose of the temporary  
25 employee's hiring; (3) creating written disciplinary  
26 documentation that was either disputed or fabricated; (4) issuing  
27 a one-week suspension with pay contingent upon plaintiff  
28 accepting written discipline; (5) issuing multiple written  
disciplinary documents designed to document the file to support  
termination when the discipline was unwarranted; and (6)  
terminating her based upon almost entirely subjective grounds  
including messiness of the office and desk and during a period  
when her absence from the office had previously been approved.  
These arguments are addressed below.

1 her request for written information about its FMLA policies.

2 Under the DOL regulations governing notice to employees, the  
3 employer must first include written guidance to employees about  
4 FMLA entitlements and employee obligations under FMLA in any  
5 employee handbook or policies concerning employee benefits or leave  
6 rights. 29 C.F.R. § 825.301(a)(1). If the employer does not have  
7 such written policies or handbooks, the employer must provide  
8 written guidance to employees concerning the employee's FMLA rights  
9 and obligations. 29 C.F.R. § 825.301(a)(2).

10 The notice required under section 825.301(a)(2) must be  
11 provided to employees each time notice is given pursuant to section  
12 825.301(b) and in accordance with the provisions of that section.  
13 Id. Section 825.301(b)(1) states that the employer must provide  
14 the employee with "written notice detailing the specific  
15 expectations and obligations of the employee [regarding FMLA leave]  
16 and explaining any consequences of a failure to meet these  
17 obligations." 29 C.F.R. § 825.301(b)(1). The notice must include,  
18 as appropriate: (1) that the leave will be counted against the  
19 employee's annual FMLA leave entitlement; (2) any requirements for  
20 the employee to furnish medical certification; (3) the employee's  
21 right to substitute paid leave, and, if the employer requires such  
22 substitution; (4) any requirement regarding premium payments for  
23 maintaining health benefits; (5) any requirements for a fitness-  
24 for-duty certificate; (6) if the employee is considered a "key  
25 employee"; (7) the right to restoration to the same or equivalent  
26 job upon return; and (8) the employee's potential liability for  
27 payment of health insurance premiums paid by the employer during  
28 the unpaid FMLA leave if the employee fails to return to work after

1 taking FMLA leave. Id.

2 The notice required under subsection (b) (1)

3 must be provided to the employee no less often than the  
4 first time in each six-month period that an employee  
5 gives notice of the need for FMLA leave (if FMLA leave is  
6 taken during the six-month period). The notice shall be  
given within a reasonable time after notice of the need  
for leave is given by the employee--within one or two  
business days if feasible.

7 29 C.F.R. § 825.301(c).

8 In addition to providing the written notices required under  
9 sections 825.301(a) and (b), employers "are also expected to  
10 responsively answer questions from employees concerning their  
11 rights and responsibilities under the FMLA." 29 C.F.R. §  
12 825.301(d). If any employer fails to provide notice in accordance  
13 with section 825.301, "the employer may not take action against an  
14 employee for failure to comply with any provision required to be  
15 set forth in the notice." 29 C.F.R. § 825.301(f).

16 There is some authority for plaintiff's position that failure  
17 to provide the various notices required by FMLA can, in some cases,  
18 support a claim for unlawful interference with FMLA rights under 29  
19 U.S.C. § 2615(a) (1). E.g., Conoshenti v. Public Serv. Elec. & Gas  
20 Co., 364 F.3d 135, 143-46 (3d Cir. 2004) (notice advising of FMLA  
21 rights); Sistrun v. Time-Warner Cable, No. Civ. A. 02-CV-8023, 2004  
22 WL 1858042, at \*13-14 (E.D. Pa. Aug. 19, 2004) (notice regarding  
23 designation of leave as FMLA leave); Nusbaum v. CB Richard Ellis,  
24 Inc., 171 F. Supp. 2d 377 (D.N.J. 2001) (posted notices in  
25 workplace, notice in employee handbook).

26 However, it is clear that this is not akin to a strict  
27 liability offense. As explained in Conoshenti, "an actionable  
28 'interference' in violation of § 2615(a)" exists when the plaintiff

1 "is able to show prejudice as a result of that violation." 364  
2 F.3d at 144. The plaintiff "will show an interference with his  
3 right to leave under the FMLA, within the meaning of 28 U.S.C. §  
4 2615(a), if he is able to establish that this failure to advise  
5 rendered him unable to exercise that right in a meaningful way,  
6 thereby causing injury." Id. at 143.

7 Other courts have reached similar conclusions. E.g., Sarno v.  
8 Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 161-62 (2d Cir.  
9 1999) (assuming the employer failed to give adequate notice of FMLA  
10 rights to employee, district court properly dismissed claim when  
11 lack of notice did not prejudice employee; rejecting argument that  
12 employee may sue employer for failure to give notice even if that  
13 failure in no way affected the employee's leave, benefits, or  
14 reinstatement); Nusbaum, 171 F. Supp. 2d at (upholding claim, in  
15 face of defendant's motion to dismiss, that FMLA notice regulations  
16 were valid and that failure to give proper information interfered  
17 with plaintiff's right to structure leave in a way that would have  
18 given her FMLA protection); Palma v. Pharmedica Communications,  
19 Inc., 2001 WL 406330, at \*2-3 (D. Conn. Apr. 11, 2001) (no private  
20 right of action for failure to post notice of FMLA rights when no  
21 evidence that such failure caused any interference with the  
22 plaintiff's exercise of or attempt to exercise her FMLA rights).

23 While the Ninth Circuit does not appear to have squarely  
24 addressed this issue, I conclude based on the cases cited above,  
25 that for a plaintiff to succeed on a claim of interference under  
26 section 2615(a)(1) based on the alleged failure to give the  
27 required notice(s) under 29 C.F.R. § 825.301, the plaintiff must  
28 show that the alleged failure caused the plaintiff some prejudice,

1 "render[ing the plaintiff] unable to exercise that right in a  
2 meaningful way, thereby causing injury."

3 This conclusion is supports rejecting defendant's argument  
4 that the notice regulations are invalid under Ragsdale v. Wolverine  
5 World Wide, Inc., 535 U.S. 81 (2002). There, the Supreme Court  
6 struck down a DOL regulation providing that if the employer failed  
7 to designate leave as FMLA leave, the leave taken does not count  
8 against an employee's FMLA entitlement. 29 C.F.R. § 825.700(a).  
9 The Court concluded that the rule's "categorical penalty is  
10 incompatible with the FMLA's comprehensive remedial mechanism."  
11 Id. at 89.

12 The Court reasoned:

13 The challenged regulation is invalid because it  
14 alters the FMLA's cause of action in a fundamental way:  
15 It relieves employees of the burden of proving any real  
16 impairment of their rights and resulting prejudice. In  
17 the case at hand, the regulation permitted Ragsdale to  
18 bring suit under § 2617, despite her inability to show  
19 that Wolverine's actions restrained her exercise of FMLA  
20 rights. Section 825.700(a) transformed the company's  
21 failure to give notice--along with its refusal to grant  
22 her more than 30 weeks of leave--into an actionable  
violation of § 2615. This regulatory sleight of hand  
also entitled Ragsdale to reinstatement and backpay, even  
though reinstatement could not be said to be  
"appropriate" in these circumstances and Ragsdale lost no  
compensation "by reason of" Wolverine's failure to  
designate her absence as FMLA leave. By mandating these  
results absent a showing of consequential harm, the  
regulation worked an end run around important limitations  
of the statute's remedial scheme.

23 Id. at 91.

24 The Court further noted that a position in which the failure  
25 to designate leave actually has some prejudicial effect on the  
26 employee "may be reasonable[.]" Id. at 89. But, the Court stated,  
27 "the more extreme one embodied in § 825.700(a) is not." Id. The  
28 court expressly declined to decide "whether the notice and

1 designation requirements are themselves valid or whether other  
2 means of enforcing them might be consistent with the statute." Id.  
3 at 96.

4 Following Ragsdale, several courts have held that an action  
5 may be based on notice requirement violations accompanied by a  
6 showing of prejudice. Conoshenti, 362 F.3d at 143; Sims v.  
7 Schultz, 305 F. Supp. 2d 838, 845 (N.D. Ill. 2004) ("Ragdsale does  
8 not prevent an employee from attempting to prove he was prejudiced  
9 by his employer's failure to provide timely notice."); Donahoo v.  
10 Master Data Center, 282 F. Supp. 2d 540, 555 (E.D. Mich. 2003)  
11 (employee can recover for actual prejudice caused by employer's  
12 failure to provide notice); Farina v. Compuware Corp., 256 F. Supp.  
13 2d 1033, 1055 (D. Ariz. 2003) (post-Ragsdale, plaintiff must show  
14 that she detrimentally relied on and was prejudiced by defendant's  
15 improper notice).

16 There is no dispute that plaintiff requested written materials  
17 and did not receive them. There is also no dispute that Bailey  
18 told plaintiff orally that plaintiff was ineligible for FMLA leave  
19 for her niece's illness. Plaintiff does not dispute that FMLA  
20 leave was unavailable to her when her niece became ill. See 29  
21 U.S.C. § 2612(a)(1)(C) (granting entitlement to leave to care for  
22 spouse, son, daughter, or parent of employee).

23 Given that her niece's illness does not qualify plaintiff for  
24 FMLA leave, plaintiff cannot show any prejudice resulting from  
25 defendant's failure to provide her with written information about  
26 her FMLA rights. There can be no interference with her FMLA rights  
27 when she has none. Hoffman v. Professional Med Team, 394 F.3d 414,  
28 418 (6th Cir. 2005) ("[t]o prevail in a claim of interference under

1 the FMLA, the employee must prove, among other elements, that she  
2 was entitled to leave under the FMLA.").

3 The record indicates that plaintiff requested leave  
4 information related to the potential guardianship of her niece's  
5 children. At the time of her request, plaintiff possessed no FMLA  
6 rights in regard to the children because the statute provides that  
7 FMLA leave commences with the placement of a son or daughter for  
8 adoption or foster care. 29 U.S.C. § 2612(a)(1)(B). Apparently,  
9 neither of the children was actually placed in plaintiff's care  
10 until several months after her termination.

11 Nonetheless, I assume that the notice provisions in section  
12 825.301 apply to the request for information in anticipation of  
13 qualifying FMLA leave.<sup>3</sup> Thus, in contrast to the request for  
14 information triggered by her niece's illness, the failure to  
15 provide the written information in response to the request  
16 triggered by the children's possible adoption or placement as  
17 foster children, can form the basis of plaintiff's claim.

18 Similarly, there is no dispute that the failure to provide  
19 written information triggered by plaintiff's mother's illness can  
20 form the basis of plaintiff's claim because her mother's illness  
21 qualified plaintiff for immediate FMLA leave.

22 Defendant's evidence shows that both Cole and Bailey orally  
23 gave plaintiff accurate information about her FMLA rights in  
24

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25 <sup>3</sup> Although not actually briefed by the parties, I have no  
26 doubt that the notice provisions should apply to anticipated FMLA  
27 leave so that employees who become pregnant or who are scheduling  
28 surgery, etc., may receive the pertinent information so they know  
beforehand what their rights are and then can make educated  
decisions about their time off.

1 response to her requests triggered by her niece's illness and her  
2 mother's illness. However, the evidence indicates that plaintiff  
3 received no information, written or oral, from anyone with  
4 defendant regarding FMLA leave related to the care of her niece's  
5 children.

6 Additionally, plaintiff relies on her declaration in which she  
7 states that she was provided "conflicting information" about her  
8 leave rights. Pltf's Exh. 100 (Pltf Declr.) at ¶¶ 14, 17, 18, 21.  
9 The "conflicting information" she recites was provided by the Sears  
10 88 line and concerned paid employee disability leave for herself  
11 caused by the psychological stress she was under and whether this  
12 leave was available to Contract Sales employees. Id. at ¶ 14.<sup>4</sup>

13 While the conflicting information about the possible paid  
14 leave was not information about FMLA leave per se, it is possible  
15 that the failure to provide written information as to plaintiff's  
16 FMLA leave rights, in combination with the conflicting information  
17 on the employer's paid employee disability leave, caused plaintiff  
18

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19  
20 <sup>4</sup> Defendant argues that this statement in plaintiff's  
21 declaration must be disregarded because it is contradicted by her  
22 deposition testimony where plaintiff testified that she did not  
23 recall having a conversation with anyone associated with  
24 defendant about whether the impact of the events on her would  
25 qualify for some type of disability or illness-paid leave.  
26 Deft's Exh. 11A (Pltf Depo.) at pp. 105-06.

27 I reject defendant's argument because the deposition  
28 testimony is not entirely clear. The statement was made during  
questioning about what information plaintiff received from Cole  
or Bailey, not the Sears 88 line, and plaintiff, while at first  
stating that she did not speak with anyone with defendant  
regarding disability leave, then states she did not discuss the  
leave with Bailey. As such, it would be inappropriate to strike  
her declaration statement regarding information she states she  
received from the Sears 88 line.

1 to delay taking FMLA leave until she received the written  
2 information. If she could qualify for paid leave under the  
3 employer disability plan, it was not in her interest to take unpaid  
4 FMLA leave. Moreover, in the face of receiving conflicting  
5 information about one type of leave, it was not unreasonable for  
6 her to assume that the information she received orally about FMLA  
7 leave may be inaccurate as well. Thus, she sought written  
8 information about FMLA leave in order to make an educated decision  
9 about her rights. The evidence is capable of suggesting that the  
10 failure to provide the written information on FMLA delayed  
11 plaintiff's invocation of her FMLA leave rights, leaving her in a  
12 position vulnerable to increased complaints, discipline, and  
13 eventually termination. Plaintiff has created an issue of fact  
14 regarding prejudice caused by the failure to provide written notice  
15 under FMLA.

16 As noted above in footnote two, plaintiff raises several other  
17 bases in support of her interference claim. Issues of fact at  
18 least as to some of these bases preclude summary judgment for  
19 defendant on the remainder of plaintiff's FMLA claim.  
20 Additionally, it is important to note that with FMLA interference  
21 claims, plaintiff "need only prove by a preponderance of the  
22 evidence that her taking of FMLA-protected leave [or in this case,  
23 her requests for FMLA-protected leave], constituted a negative  
24 factor in the decision to terminate her [or visit other adverse  
25 employment actions upon her]." Bachelder, 259 F.3d at 1125. The  
26 McDonnell-Douglas anti-discrimination analysis used in Title VII  
27 and other employment discrimination cases is not used in FMLA  
28 interference claims. Id.

1 First, as plaintiff notes, she received no written discipline  
2 until after she first mentioned leave. While the record shows that  
3 there were complaints pre-dating her leave request and an oral  
4 warning from Cole in late July 2003, again predating her leave  
5 requests, the timing of the initial written discipline creates a  
6 question of whether her requests for leave influenced defendant's  
7 discipline decision.

8 Second, plaintiff points to the hiring of Connor, the alleged  
9 temporary replacement. While Cole states that Connor was intended  
10 to replace plaintiff only during her anticipated leave, and that  
11 perhaps she could convince defendant to keep Connor on as a second  
12 Appliance Select Consultant after plaintiff's return, Connor states  
13 that no one with defendant, even Cole, told her that her hiring was  
14 only temporary. She further states that she was told that she was  
15 being hired because plaintiff was being let go. Viewing the  
16 evidence in a light most favorable to plaintiff, this could show  
17 that at the time of Connor's hiring in early to mid-September 2003,  
18 plaintiff's fate was predetermined and that her later termination  
19 in October, allegedly based on her failure to meet the  
20 organizational expectations previously documented in written  
21 discipline, was a pretext. This allows the inference that her  
22 leave requests may have been a negative factor in the decision to  
23 terminate her.

24 Third, the record supports plaintiff's testimony that Cole  
25 gave little time and effort to contacting the customers plaintiff  
26 believed would support her. Again, looking at the evidence in a  
27 light most favorable to plaintiff, this could suggest that Cole was  
28 more interested in documenting a negative record for plaintiff

1 rather than balancing it with possible positive comments. This  
2 also allows the inference that Cole may have been negatively  
3 influenced by plaintiff's leave requests.

4 Fourth, plaintiff notes that when she was provided on-site  
5 training in the Redmond, Washington Appliance Select Center, she  
6 observed a lack of organization and messiness consistent with the  
7 Portland/Tigard Appliance Select Center. This creates an inference  
8 that her termination for failure to meet the organization and  
9 neatness requirements outlined by Cole, was a pretext.

10 Defendant's motion for summary judgment on the FMLA  
11 interference claim should be denied.

## 12 II. OFLA Claim

13 Similar to FMLA, OFLA creates a right for eligible employees  
14 to unpaid leave to care for a family member with a serious health  
15 condition or to care for a newly adopted child or newly placed  
16 foster child under eighteen years of age. O.R.S. 659A.159.  
17 "Family member" is defined as the employee's (1) spouse; (2)  
18 biological, adoptive, or foster parent or child; (3) parent-in-law;  
19 or (4) a person with whom the employee was or is in a relationship  
20 of in loco parentis. O.R.S. 659A.150(4). Also, similar to the  
21 FMLA, upon conclusion of OFLA leave, the employee is to be returned  
22 to his or her previously held position or to an available  
23 equivalent position with equivalent employment benefits, pay, and  
24 other terms and conditions of employment. O.R.S. 659A.171(1).

25 Under the OFLA statutes, OFLA unlawful employment practices  
26 are limited to the denial of requested OFLA leave. O.R.S.  
27 659A.183. However, the Oregon Bureau of Labor & Industries (BOLI)  
28 has adopted an administrative rule providing that

1 [i]t is an unlawful employment practice for an employer  
2 to retaliate or in any way discriminate against any  
3 person with respect to hiring, tenure or any other term  
4 or condition of employment because the person has  
inquired about OFLA leave, submitted a request for OFLA  
leave or invoked any provision of the Oregon Family Leave  
Act.

5 Or. Admin. Rule (OAR) 839-009-0320(3).

6 In a recent decision, the Oregon Court of Appeals held that  
7 the combination of OFLA statutes and this administrative rule  
8 "create[s] a civil remedy for retaliatory discharge under OFLA."  
9 Yeager v. Providence Health Sys. Or., 195 Or. App. 134, 139, 96  
10 P.3d 862, 865 (2004), rev. denied, 337 Or. 658, 103 P.3d 641  
11 (2004). Yeager went on to hold that this retaliation cause of  
12 action exists even for those employees who are not themselves  
13 eligible for OFLA leave. Id. at 140, 96 P.3d at 865.

14 Plaintiff relies upon the reasoning in Yeager in support of  
15 her OFLA retaliation claim. She also argues that she has created  
16 an issue of fact as to defendant's motive in disciplining and  
17 terminating her and thus, defendant's motion for summary judgment  
18 must be denied. Defendant contends that plaintiff has not created  
19 an issue of fact regarding the causation element of her retaliation  
20 claim.

21 Neither party cites to a 2002 Findings & Recommendation in  
22 which I concluded that the OAR which purports to create the OFLA  
23 retaliation cause of action was invalid. Denny v. Union Pac. R.R.,  
24 No. CV-00-1301-HU, Findings & Rec. at pp. 7-9 (D. Or. Oct. 31,  
25 2002), adopted by Judge Jones, January 20, 2003. I determined that

1 BOLI's adoption of OAR 839-009-0320(3)<sup>5</sup> unlawfully expanded the  
2 scope of the rights afforded by the statute.

3 Other judges in this Court have expressly adopted the  
4 reasoning expressed in Denny. Ladendorff v. Intel Corp., No. CV-  
5 02-6259-AS, Opinion & Order at pp. 14-20 (D. Or. Mar. 19, 2004)  
6 (Judge Ashmanskas); Head v. Glacier Northwest, Inc., No. CV-02-373-  
7 MA, Opinion & Order at p. 3 (D. Or. Apr. 30, 2003) (Judge Marsh);  
8 Loumena v. Les Schwab Tire Centers of Portland, Inc., No. CV-02-  
9 856-KI, 2003 WL 23957142, at \*6 (D. Or. Oct. 2, 2003) (Judge King).  
10 Additionally, Judge Brown, without citing to Denny, held that  
11 there is no retaliation action under OFLA. Jacoban v. Fred Meyer  
12 Stores, Inc., No. CV-02-1550-BR, Opinion & Order at p. 20 (D. Or.  
13 Oct. 16, 2003) ("The only cause of action authorized by the Oregon  
14 Legislature under OFLA arises from an employer's denial of an  
15 employee's leave request.").

16 All of these decisions, however, preceded Yeager. While this  
17 Court is not bound by decisions of lower state courts, Vestar  
18 Development II, LLC v. General Dynamics Corp., 249 F.3d 958, 960  
19 (9th Cir. 2001) ("When interpreting state law, federal courts are  
20 bound by decisions of the state's highest court"), Yeager  
21 nonetheless presents the Court with the opportunity to reevaluate  
22 the Denny analysis. Because this issue was not addressed by the  
23 parties in their briefing, I will defer ruling on the issue of  
24 whether a retaliation cause of action exists under OFLA until  
25 hearing from the parties at an oral argument to be held as soon as

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27  
28 <sup>5</sup> The Denny opinion refers to the identical OAR as 839-009-  
0320(2) rather than 839-009-0320(3).

1 practicably possible. After oral argument, I will issue a  
2 supplemental Findings & Recommendation as to that issue and will  
3 refer both this Findings & Recommendation and the supplemental  
4 Findings & Recommendation, at the conclusion of the period for  
5 objections and responses, together to the District Judge for  
6 review. My courtroom deputy will contact the parties to schedule  
7 the argument.

8 Should I conclude that plaintiff's OFLA retaliation claim is  
9 valid, I agree with plaintiff that issues of fact remain as to the  
10 motive behind defendant's discipline and termination. As explained  
11 in connection with the FMLA claim, the facts raised by plaintiff,  
12 viewed in a light most favorable to plaintiff, suggest that  
13 defendant's articulated reasons for the discipline and termination  
14 may have been pretextual and that it was motivated to act, at least  
15 in part, in response to plaintiff's requests for leave.

### 16 III. Wrongful Discharge Claim

17 Oregon recognizes common law claims for wrongful discharge in  
18 the context of at-will employment relationships when the employee  
19 alleges he or she has been discharged for fulfilling a societal  
20 obligation or for pursuing an employment-related right of public  
21 importance. Dunwoody v. Handskill Corp., 185 Or. App. 605, 609-12,  
22 60 P.3d 1135, 1138-39 (2003). However, the availability of an  
23 adequate statutory remedy precludes a common law wrongful discharge  
24 claim. Id.; see also Holien v. Sears, Roebuck and Co., 298 Or. 76,  
25 97, 689 P.2d 1292 (1984).

26 Both this Court and the Oregon Court of Appeals have concluded  
27 that under Oregon law, a common law wrongful discharge claim may be  
28 based on the alleged interference with FMLA or OFLA rights.

1 Washington v. Fort James Op. Co., 110 F. Supp. 2d 1325, 1334 (D.  
2 Or. 2000) (because FMLA does not allow for emotional distress  
3 damages, it provides an "inadequate" statutory remedy, allowing  
4 plaintiff to base her wrongful discharge claim on a violation of  
5 FMLA); Yeager, 195 Or. App. at 140-43, 96 P.3d at 865-67  
6 (recognizing common law wrongful discharge claim based on violation  
7 of OFLA given OFLA's reflection of an important public policy).

8 Defendant argues that it is entitled to summary judgment on  
9 the wrongful discharge claim because plaintiff fails to show a  
10 causal connection between her employment rights and her  
11 termination. However, as explained in connection with the FMLA  
12 claim, when the facts are examined in a light most favorable to  
13 plaintiff, they are capable of suggesting that defendant may have  
14 been motivated by plaintiff's leave requests when it terminated  
15 plaintiff. I recommend that defendant's motion on the wrongful  
16 discharge claim be denied.

#### 17 IV. Destruction of January 2003 Performance Review

18 Although not made as a separate motion, plaintiff argues in  
19 her response memorandum that defendant destroyed plaintiff's  
20 January 2003 positive performance evaluation, that this constituted  
21 a spoliation of evidence by defendant, and that plaintiff is  
22 entitled to all favorable inferences regarding that performance  
23 evaluation as a result of defendant's actions.

24 First, I note that the record does not establish that the  
25 January 2003 performance evaluation was intentionally destroyed.  
26 Second, and more importantly, defendant represents in its reply  
27 memorandum that the allegedly destroyed document has been found.  
28 A copy is attached to defendant's exhibits submitted in reply.

1 Thus, I need not further address this argument.

2 V. Plaintiff's Motion to Strike

3 Plaintiff moves to strike defendant's Exhibits 15-47, and 49-  
4 51, all of which are emails that Cole sent to herself or that she  
5 apparently received as emails from other employees or customers.  
6 I deny the motion as moot. First, even considering the emails, I  
7 recommend denying defendant's motion as to all of the FMLA-  
8 interference claim except for the portion based on the notice  
9 argument, the OFLA claim should I determine there is an OFLA  
10 retaliation cause of action, and the wrongful discharge claim.  
11 Second, I considered none of the exhibits sought to be stricken in  
12 the analysis of the notice-interference claim. Given this  
13 disposition, I deny plaintiff's request for oral argument on the  
14 motion to strike.

15 CONCLUSION

16 I recommend that defendant's motion for summary judgment  
17 (#22) denied as to the FMLA and wrongful discharge claims. I defer  
18 ruling on the OFLA claim until after oral argument. I deny  
19 plaintiff's motion to strike (#27) as moot.

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1 SCHEDULING ORDER

2 The above Findings and Recommendation will be referred to a  
3 United States District Judge for review together with the  
4 supplemental Findings & Recommendation on the OFLA claim. A  
5 scheduling order for objections and responses to objections will be  
6 issued for both Findings & Recommendations when the supplemental  
7 Findings & Recommendation is filed, after oral argument.

8 IT IS SO ORDERED.

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10 Dated this 7th day of March, 2005.

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13 /s/ Dennis James Hubel  
14 Dennis James Hubel  
United States Magistrate Judge  
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